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No. 8, Original

IN THE

Supreme Court of the United States

STATE OF ARIZONA,

Plaintiff,

v.

STATE OF CALIFORNIA, *et al.*,

Defendants.

THE STATE PARTIES' REPLY TO EXCEPTIONS OF THE UNITED STATES AND THE QUECHAN INDIAN TRIBE TO REPORT OF THE SPECIAL MASTER

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65 pp

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THE STATE PARTIES' REPLY TO EXCEPTIONS OF THE UNITED STATES AND THE QUECHAN INDIAN TRIBE TO REPORT OF THE SPECIAL MASTER

I. INTRODUCTION

The Special Master's Report of July 28, 1999 ("Rep."), describing it as a "close question," rejected the State Parties' contention that the finality principles applied by this Court in *Arizona v. California*, 460 U.S. 605 (1983) ("*Arizona II*"), and *Nevada v. United States*, 463 U.S. 110 (1983), precluded consideration of the claims by the United States and the Quechan Tribe ("Tribe") for a water allocation for the disputed boundary lands on the Fort Yuma Indian Reservation ("FYIR"). Rep. App. 2A, Memorandum Opinion and Order No. 4 ("Mem. Opin. No. 4") at 7.

However, the Special Master did not find the State Parties' argument as to the preclusive effect of payment of the 1983 Claims Court judgment in Docket No. 320 ("Claims Court judgment") a similarly close question. On the contrary, he found that the plain language of that $15 million settlement judgment drafted by the United States and the Tribe extinguished, unequivocally and without reservation of any kind, any "claims" by the Tribe to the beneficial ownership of the disputed boundary lands. Consequently, he concluded that they could not provide the basis for a reserved water rights claim under *Winters v. United States*, 207 U.S. 564 (1908), as applied to the undisputed lands on the FYIR in *Arizona v. California*, 373 U.S. 546, 595-601 (1963) ("*Arizona I*").[1] *Id.*

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[1] In *Arizona I* the Tribe had been awarded 51,616 acre-feet of diversions for lands in the undisputed portion of the Reservation. *Arizona v. California*, 376 U.S. 340, 344 (1964) Decree). In *Arizona II*, 460 U.S.

(continued...)

at 7-10; Rep. Apps. 2B and 2C, Mem. Opin. Nos. 5 and 7.

The United States and the Tribe have filed exceptions to the Special Master's decision.[2] They contend that the Claims Court judgment cannot bear its plain meaning when "read against the history of the Quechan land dispute." U.S. Br. 32. The Court is asked to rely instead on their analysis of the proceedings before the Claims Court and alleged implications of several associated documents, particularly (1) the 1978 order by Secretary of the Interior Cecil Andrus ("1978 Secretarial order") redefining the boundary of the FYIR and purporting to restore the disputed boundary lands to the Tribe, (2) some pretrial stipulations filed in the Claims Court proceedings, and (3) a letter to the Tribe from an Acting Deputy Assistant Secretary of the Interior for Indian Affairs approving, as the Tribe's trustee, the settlement. The Tribe, but not the United States, also places great reliance on a letter from the Tribe's counsel to the Quechan Tribal Council explaining the proposed settlement. Tr. Br. 23-25. Missing from their arguments is any

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[1] (...continued)
at 636, this Court rejected Special Master Tuttle's recommendation that the decreed diversion right be increased to 130,135 acre-feet by an award of an additional 78,519 acre-feet, consisting of an award of 37,172 acre-feet on the United States' claim of irrigable acreage in the disputed boundary lands and an additional award of 41,347 acre-feet on the Tribe's supplemental claim that even more of the lands were irrigable. Report of Special Master Elbert P. Tuttle (February 22, 1982) at 196, 254, and 281. The Tribe's statement that it would only have been "entitled to an additional allocation of 40,734 acre-feet of water" (Tr. Br. 33) for the disputed boundary lands appears to be in error by overlooking the supplementary nature of its claim.

[2] Exception of the United States and Brief for the United States in Support of Exception (December 1999) ("U.S. Br."); Exception of the Quechan Indian Tribe to the Report and Recommendation of the Special Master and Supporting Memorandum (December 20, 1999) ("Tr. Br.").

meaningful discussion of the significant impact of this Court's decision in *Arizona II* on the settlement.

The United States and the Tribe also assert that the preclusive effect of the Claims Court judgment is controlled by common law principles of collateral estoppel, which they allege the Special Master misapplied.

II. STATEMENT

Summary of the Claims Court Proceedings in Docket No. 320

In 1951 the Tribe filed a "Petition for Loss of Reservation" with the Indian Claims Commission ("Commission") (U.S. Br. App. 11a) pursuant to the Indian Claims Commission Act of 1946 ("ICC Act")[3] asserting a claim for money damages arising "from the expropriation of the greater part" of the Tribe's 1884 reservation by the United States. *Id.* at 13a-14a, ¶6. Specifically, the Tribe alleged that the 1893 Cession Agreement between the Tribe and the United States ("1893 Agreement"), ratified by Congress in the Act of August 15, 1894, 28 Stat. 286 ("1894 Act"), had been obtained through fraud, coercion and unconscionable consideration rendering the agreement "wholly nugatory." *Id.* at 17a, ¶15. It also alleged that the 1893 Agreement "constituted a taking of lands belonging to the Petitioner without payment of just compensation" or, in the alternative, "an appropriation of lands belonging to the Petitioner for an unconscionable consideration and under conditions of fraud and duress." *Id.* at 19a, ¶19; 20a,

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[3] 60 Stat. 1049. The Act was codified at 25 U.S.C. §§70 *et seq.*, until September 30, 1978 when the Commission's life expired. See notes at 25 U.S.C. §§70-70v-3 (1998). The relevant sections of the Act are set out in the Appendix to this brief.

¶22. The petition also alleged that the 1894 Act had unilaterally altered the provisions of the 1893 Agreement to the Tribe's detriment. *Id.* at 18a, ¶17. In its Prayer for Relief the Tribe sought determinations that the boundary lands in dispute here were "wrongfully taken" and "wrongfully acquired" by the United States and sought compensation for the land "wrongfully appropriated" by the United States. *Id.* at 22a.

In 1958 the Tribe filed an "Amendment to Petition for Loss of Reservation." It added a fifth alternative cause of action alleging that the United States had defaulted in its obligations under the 1893 Agreement and, if the Commission determined that the 1893 Agreement was valid and binding, seeking damages for the United States' breach. *Id.* at 24a. The Tribe never again amended its complaint, not even after Secretary Andrus' 1978 order reinterpreted the 1893 Agreement as being invalid and purported to restore the disputed boundary lands to the Reservation.

After a trial was concluded on the liability phase of the case, the Commission stayed further proceedings in 1970 because legislation had been proposed in Congress to return the disputed boundary lands to the Tribe.[4] The proposed legislation was not enacted and the Tribe moved the Commission to vacate the stay order, reopen the record on liability and "declare the 1893 Agreement to be invalid and that plaintiff has retained title to its land." (26 Ind. Cl. Comm'n 15 (1971)) U.S. Br. App. 30a, 31a. The Commission vacated the stay, but held that it was "without authority to determine that

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[4] 25 U.S.C. §398d provides: "Changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress." The FYIR was created by an executive order of January 9, 1884. U.S. Br. 16.

the 1893 Agreement was invalid, and at most can determine monetary damages" for the Tribe's claims. *Id.* at 32a.

Having thus been rebuffed in its effort to quiet title to the disputed boundary lands before the Commission, and being long out of time to seek such relief under the recently enacted Quiet Title Act of 1972, 28 U.S.C. §2409a (1998),[5] sometime in 1973 the Tribe apparently requested the Secretary to reverse the 1936 opinion by Solicitor Margold (U.S. Br. 17-18, 20-21), on which the United States had relied in claiming water rights for the FYIR in *Arizona I*,[6] and to seek additional water rights for the disputed boundary lands from this Court.[7] Solicitor Austin and Secretary Kleppe declined to take that action in 1976 (U.S. Br. 21-22), but the Tribe was successful with the new Carter Administration, persuading Solicitor Krulitz and Secretary Andrus to do so in December 1978. *Id.* at 22-24. In essence, the Secretary administratively quieted title to the disputed boundary lands in the Tribe, seemingly circumventing the exclusive authority of the Commission under the ICC Act (page 10 *infra*), the exclusive authority of the federal district courts under the Quiet Title Act, *Block v. North Dakota*, 461 U.S. 273 (1983), and the exclusive prerogative of Congress to change the reservation boundary (note 4 *supra*).

Assuming that the title or liability issue had thus been "finally determined" in the Tribe's favor, the United States and

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[5] *See Navajo Tribe v. New Mexico*, 809 F.2d 1455 (10th Cir. 1987).

[6] See "Exception by State Parties to Report of Special Master and Supporting Brief" (December 20, 1999) at 7-9.

[7] The Tribe's initiative was not uncommon in the 1970's. *See Temoak Band of Western Shoshone Indians v. United States*, 593 F.2d 994 (Ct.Cl. 1979), *cert. denied*, 444 U.S. 973 (1979).

the Tribe agreed to proceed to the damages phase of the Claims Court proceedings. However, this Court's 1983 decision in *Arizona II* that the Secretary's 1978 order was not a "final determination" of the disputed boundary for purposes of an increased water allocation stimulated a proposal by the Tribe for a cash settlement (page 33 *infra*).

On June 16, 1983 the Tribe authorized "*full settlement of the claims* of the Tribe, in Docket No. 320" for $15 million. *Id.* at App. 55a (emphasis added). Inasmuch as the Attorney General was the only federal official authorized to enter into a settlement of the claims, the Assistant Attorney General for Land and Natural Resources submitted a memorandum to the Deputy Attorney General entitled "Recommendation to Accept Offer of Settlement in the Amount of $15,000,000" ("settlement memorandum").[8] On July 8, 1983 the Attorney General accepted the Tribe's offer on certain conditions, which the Tribe approved the same day. *Id.* at 43a. After an Assistant Secretary of the Interior, as trustee for the Tribe, had approved the settlement as "fair and just" (*id.* at 62a), the parties filed a "Joint Motion for Approval of Settlement and Entry of Final Judgment." *Id.* at 63a.

On August 11, 1983 Chief Claims Court Judge Kozinski granted the motion and entered the stipulated "Final Judgment" for the Tribe in the amount of $15 million which, *inter alia*, stated that it "shall finally dispose *of all* rights, *claims*, or demands *which plaintiff has asserted* or could have

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[8] The United States identified the settlement memorandum during discovery but declined to produce it on the grounds that it is not relevant to the meaning of the Claims Court judgment and is a privileged attorney-client communication or, in the alternative, protected under the work product doctrine. The Special Master sustained that objection. Mem. Opin. No. 4 at 8.

asserted" in the case and, *inter alia*, "barred [the Tribe] from . . . *any* future action on the *claims* encompassed in Docket 320." *Id.* at 66a-67a (emphasis added). The judgment amount was duly paid to the Tribe. 50 Fed. Reg. 12410 (1985).

III. SUMMARY OF THE ARGUMENT

The Claims Court judgment unambiguously "disposed" of "all" of the Tribe's pending "claims" for a $15 million payment by the United States and "barred . . . any future action" on them. Those claims could only be identified by reference to the Tribe's petition before the Commission, which alleged that the United States had "expropriated" the disputed boundary lands and sought just compensation for that "taking." Contrary to the United States' astounding assertion that "the Master misunderstood the nature of the Claims Court's judgment and its legal significance,"[9] he clearly understood and correctly interpreted the plain language of that judgment and its legal effect under controlling case law. The efforts by the United States and the Tribe to amend that judgment based on unfounded inferences they would have the Court draw from several selected background documents associated with the Claims Court proceedings must be rejected both because (1) reliance on such extrinsic evidence would be inappropriate and (2) in any event, the documents do not support their claims.

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[9] U.S. Br. 32. In a similar vein, the Tribe's first motion for reconsideration of the Special Master's decision contended that the State Parties had "misrepresented to the Special Master the Quechan Tribe's claim in Docket No. 320" and "intentionally misled" him. Motion for Reconsideration of the Special Master's Ruling of September 6, 1991, Filed by the Quechan Tribe of Indians (September 20, 1991) at 2. Special Master Frank McGarr is a highly respected retired Chief Judge of the United States District Court for the Northern District of Illinois.

The United States' protracted discourse on why the Claims Court settlement judgment did not reflect the actual intent of the parties who wrote it is a flawed *post hoc rationalization* of the meaning of the Claims Court judgment and should be rejected. *Motor Vehicle Mfrs. Assn. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("courts may not accept appellate counsel's post hoc rationalizations for agency action").

The United States and the Tribe ignore the *statutory preclusion* principles applicable to payments of judgments under the ICC Act, erroneously relying instead on common law principles of collateral estoppel. The applicable law is not "the legal principles governing claim and issue preclusion" as the United States contends (U.S. Br. 32), devoting seven pages of its brief to that subject (U.S. Br. 35-41) but, amazingly, not even mentioning the "statutory preclusion" cases relied on by the Special Master (page 21 *infra*). The Tribe presents a similar discussion on the law of collateral estoppel (Tr. Br. 16-22), as well as a long argument on the merits of the dispute over the legal effect of the 1893 Agreement. Tr. Br. 27-33. Inasmuch as the Special Master did not address the merits of the dispute, neither do the State Parties, other than to note that they agree with the reasoning and conclusions of Solicitor Austin in 1977. 84 Int. Dec. 1 (1977).[10]

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[10] The United States' asserts that the Austin opinion had been issued "under unusual circumstances." U.S. Br. 22-23. The only "unusual circumstance" surrounding the Austin opinion is that it was issued after the affected water users in Arizona and California were granted a two day hearing before Solicitor Austin and Secretary Kleppe, in sharp contrast to the *ex parte* decisions previously rendered on the Fort Mojave and Colorado River Indian Reservation boundary disputes and Solicitor Krulitz on this dispute. *Arizona II* at 631-32, 636-37.

The State Parties also note that before the Claims Court in Docket No. (continued...)

The Claims Court judgment, like the judgments on the boundary adjustments on the Fort Mojave and Cocopah reservations addressed in *Arizona II*, 460 U.S. at 633, 636, 640, was a "final determination" of the title status of the disputed boundary lands, *i.e.*, upon payment of the judgment the Tribe's title was extinguished and conclusively vested in the United States. Consequently, they are not held in trust by the United States for the Tribe, but are "public domain" lands not entitled to a reserved water right under *Winters v. United States*, 207 U.S. 564 (1908), as applied in *Arizona I*.[11]

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[10] (...continued)
320 the United States contended that the "1893 Agreement was a valid and subsisting fair and conscionable agreement obtained under proper and fair means, at the behest of the Indians and for their exclusive benefit, without benefit or profit to the United States and that the United States has fully performed each and every provision of the 1893 Agreement." Defendant's Requested Findings of Fact, Objections to Petitioner's Proposed Findings of Fact, and Brief" (July 1964) at 2.

[11] Of course, nothing prevents Congress from restoring the ceded lands to the Reservation, n. 4 *supra*, which apparently was proposed, unsuccessfully, in 1971 (p. 4 *supra*). However, even if it did so, any *Winters* water right priority date would be no earlier than the date of the restoration order, which would be junior to other existing Arizona and California users. *See, e.g., Arizona II*, 460 U.S. at 641 (Cocopah Reservation expansion). See also *Arizona I*, Decree, Art. II(D), ("provided further that nothing herein shall prohibit the United States from making future additional reservations of mainstream water for use in any of such States as may be authorized by law and *subject to* present perfected rights and *rights under contracts theretofore made with water users in such State* under Section 5 of the Boulder Canyon Project Act or any other applicable federal statute"). 376 U.S. 340, 344 (emphasis added).

IV. ARGUMENT

A. Payment of the Claims Court Judgment Conclusively Extinguished the Tribe's Title to the Disputed Boundary Lands and Removed Any Legal Basis for a Reserved Water Right for Such Lands

"The 'chief' purpose of the [Indian Claims Commission Act] was to dispose of the Indian claims problem with finality." *United States v. Dann*, 470 U.S. 39, 45 (1985). The Act conferred *exclusive* jurisdiction on the Commission to resolve Indian claims solely by the payment of compensation.[12] The Commission's "final determinations" (§19, App. 1a) were subject to review by the Court of Claims (§20, *id.*) and were to be submitted to Congress for payment (§21, App. 3a). Section 15 provided that the Attorney General was to represent the United States before the Commission and authorized him/her, "with the approval of the Commission, to compromise any claim presented to the Commission." App. 1a. Such compromises were to "be submitted by the Commission to the Congress as a part of its report as provided in section 21 hereof *in the same manner as final determinations of the Commission, and shall be subject to the provisions of section 22 hereof.*" *Id.* (emphasis added).

Section 22 specified the legal effect of Congressional payment of claims pursuant to the Commission's referral, whether as a result of litigation or "compromise" (*i.e.*, settlement) (App. 3a):

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[12] *Navajo Tribe v. New Mexico*, 809 F.2d 1455 (10th Cir. 1987); *Oglala Sioux Tribe v. United States*, 650 F.2d 140 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982).

> Sec. 22. (a) When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is hereby authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.
>
> The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.
>
> (b) A final determination against a claimant made and reported in accordance with this Act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

The early cases interpreting the preclusive effect of Commission settlement judgments discussed the matter solely in terms of res judicata. *See, e.g., United States v. Southern Ute Tribe of Indians*, 423 F.2d 346, 356-57 (Ct. Cl. 1970). In 1976, the Ninth Circuit addressed the question in the context of a number of federal actions allegedly extinguishing the title to certain Indian lands and concluded that "any ambiguity about extinguishment that may have remained after the establishment of the forest reserves, has been decisively resolved by congressional payment of compensation to the Pit River Indians for these lands" pursuant to a settlement agreement under the ICC Act. *United States v. Gemmill*, 535 F.2d 1145, 1149 (9th Cir.), *cert. denied*, 429 U.S. 982 (1976).

Two years later the Ninth Circuit rendered the first of three decisions involving the title to certain lands as to which the United States claimed that the Dann family of Western Shoshone Indians were in trespass, but which the Danns claimed they owned. In *United States v. Dann*, 572 F.2d 222 (9th Cir. 1978) (*Dann I*), the court reversed a district court ruling that "collateral estoppel foreclosed the Danns from asserting that they had title to the lands because the Indian Claims Commission . . . had ruled that the lands had been acquired by the United States and that the Indians' title had been extinguished." *Id.* at 223. It held that res judicata was not applicable because the "extinguishment [of title] question was not placed in issue in the litigation before the ICC" and so was "neither actually litigated or actually decided." *Id.* at 226.

On remand, the district court concluded that the intervening affirmance of the Commission's award by the Court of Claims and its certification to Congress for payment made the award "final for purposes of res judicata and collateral estoppel" and extinguished the Dann's title "as of the date when the award was certified to the General Accounting Office." *United States v. Dann*, 706 F.2d 919, 923 (9th Cir. 1983) (*Dann II*). On appeal, the Government's argument that the court's earlier collateral estoppel decision in *Dann I* was in error was rejected on the ground that it was the "law of the case." *Id.* at 923. However, the Government's alternative argument was of special significance in light of its present arguments (*id.* at 924, emphasis added):

> The government next contends that, apart from its collateral estoppel effect, *the claims award operates by way of bar or merger to preclude the entire title claim of the Danns, under the provisions of [section 22 of]* the Indian Claims Act and the doctrine of res judicata.

The Ninth Circuit accepted the Government's "statutory preclusion" argument, but further held that it was the "exclusive" bar to further claims and that common law principles of res judicata were inapplicable. *Id.* Asserting that "Indian claims proceedings are highly extraordinary creatures of statute," it reasoned as follows (*id*):

> Congress was careful to delineate the manner in which the judgments reached in these unusual proceedings would be effectuated. We are reluctant to add to the statutory sanctions. We conclude, therefore, that the bar arising from a favorable claim determination takes effect upon the payment of the claim, pursuant to section 70u(a). We decline to find any common law res judicata bar effect arising before that time. Had Congress expected claims determinations to be governed by non-statutory principles of res judicata, it would have found no need to specify in subsection (a) that a bar arises from a favorable determination upon payment, and to specify in subsection (b) that a bar arises from a determination adverse to a claimant upon the filing of the unfavorable report with Congress.

The court disagreed with the Government's contention that the claim had been "paid" when it was certified to the General Accounting Office, thereby triggering the statutory bar. It held instead that payment had not occurred because Congress had not yet permitted a plan of distribution of the proceeds to the Tribe to become available or legislated one. *Id.* at 925-927. It also rejected the Government's contention that other alleged acts had resulted in extinguishment of title and remanded the case to the district court.

The United States petitioned for certiorari, explaining the importance of the issue involved in terms that demonstrate why its present arguments in this case must be rejected:[13]

> *Our submission in this Court rests upon a statutory rule of preclusion rather than common-law rules of res judicata or collateral estoppel.* But the policies that underlie the judge-made rules of preclusion are not inapplicable here. For over 25 years the Western Shoshone maintained the position in the claims proceedings that their aboriginal title had been extinguished. To permit that question to be reconsidered in another forum at this late date is at odds with fundamental principles of judicial economy and the disfavor with which inconsistent decisions are regarded.
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> * * *
>
> The Court has recently reaffirmed the special rigor with which the policies of preclusion are to be applied in cases involving land title disputes. "Our reports are replete with reaffirmations that questions affecting titles to land, once decided, should no longer be considered open." *Arizona v. California*, No. 8 Orig. (Mar. 30, 1983), slip op. 13. Indeed, "[t]he policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning real property, land and water."

[13] Petition of the United States for a Writ of Certiorari, Docket No. 83-1486 (March 1983) at 25-26 (emphasis added).

> *Nevada v. United States*, No. 81-2245 (June 24, 1983), slip op. 17-18 n.10. The decision of the court of appeals, which gratuitously invites the wholesale litigation of subsisting Indian title to land where compensation has been awarded for extinguishment of that title, cannot be reconciled with this teaching.

This Court granted certiorari and reversed the Ninth Circuit's decision as to when "payment" under section 22 occurred, agreeing with the United States that "it occurs when funds are placed by the United States into an account in the Treasury of the United States for the Tribe." *United States v. Dann*, 470 U.S. 39, 44-45 (1985). As background for its decision it emphasized that "[t]he 'chief' purpose of the Act was to dispose of the Indian claims problem with finality." *Id.* at 45.

On remand, the Danns' attempt "to limit the effect that the claims award must be given under the Supreme Court's decision" was rejected. *United States v. Dann*, 873 F.2d 1189, 1194-95 (9th Cir. 1989), *cert. denied*, 493 U.S. 890 (1989) (*Dann III*) (emphasis added):

> The Danns concede, as they must, that the statutory discharge and merger provision of §22(a) of the Act . . . now applies to *all claims* touching upon the Western Shoshone aboriginal title controversy. . . .
>
> It is true that the Supreme Court's opinion was largely confined to the point that a claim that was certified, appropriated and credited to a tribal account in the Treasury was "paid" within the meaning of §22(a) of the Act, ... But the

Court's discussion did not take place in a vacuum; *it was a ruling in this very case where the issue was whether §22(a) barred the Danns' defense to the government's trespass claim.* The Supreme Court's opinion was not advisory. . . .

Now that the Supreme Court has made it clear that the Western Shoshone claim has been paid, *we cannot avoid the rule of [United States v.] Gemmill that payment for the taking of a aboriginal title establishes that that title has been extinguished.* Even without *Gemmill*, however, we would be directed by the negative implications of the Supreme Court's closing instructions in *Dann*. The Court remanded the question of individual aboriginal title in response to the Danns' argument "that because only [tribal aboriginal rights] were before the Indian Claims Commission, the 'final discharge' of §22(a) does not bar the Danns from raising individual aboriginal title as a defense in this action." The Supreme Court's language makes little sense unless §22(a) bars a defense based on tribal aboriginal rights.

The *Dann* litigation thus established that the payment of a Commission judgment for aboriginal land claims[14] extinguishes title to the Indian lands upon which the claim is based and creates a statutory bar, independent of common law

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[14] The same rule applies to the taking of Indian reservation *trust* lands, which are involved here. *Oglala Sioux Tribe v. United States*, 650 F.2d 140 (1981), *cert. denied*, 455 U.S. 907 (1982); *Oglala Sioux Tribe v. Homestake Mining Co.*, 722 F.2d 1407 (8th Cir. 1983).

rules of res judicata and collateral estoppel, to further assertion of claims against the United States based on such extinguished title. *See also*, *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336-37 (1958).

A few years later the statutory bar was extended to later assertion of claims against third parties. *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 926 F.2d 1502, 1508 (9th Cir. 1991), *cert. denied*, 502 U.S. 956 (1992) (payment of Commission award of compensation for riverbed lands "conclusively establishes that the aboriginal title has been extinguished"and cannot form the basis for a claim against a third party for the same lands); *Western Shoshone National Council v. Molini*, 951 F.2d 200, 202 (9th Cir. 1991) (extinguishment of title does not apply only to claims against the United States, but "constitute[s] a general determination of title which bars the Shoshone from asserting title against the State of Nevada"); *accord: Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991), *cert. denied*, 503 U.S. 959 (1992). This was a logical and inevitably necessary development in the implementation of the finality goal of the ICC Act. It would have been incongruous for Congress to establish a comprehensive claims resolution procedure (1) to resolve all past wrongs that may have been done to the Indians, including claims against the United States for failing to protect them against third party deprivations, and (2) to extinguish those claims by payments from the Treasury and, at the same time, permit them to assert those very same claims against third parties. Such a result would allow a Tribe to obtain a double recovery, first getting money from the United States and then getting the land back (including appurtenant water rights) or additional money from third parties. However, Congress intended to settle Indian claims *forever* in final judgments. It did not intend that they would rise Phoenix-like in different contexts to haunt the West.

B. The Special Master Correctly Interpreted the Unambiguous Language of the Claims Court Judgment and its Legal Effect

The Claims Court judgment provided as follows (U.S. Br. 66a-67a, emphasis added):

> Entry of this final judgment *shall finally dispose* of all rights, *claims*, or demands *which plaintiff has asserted* or could have asserted with respect to the claims in Docket 320, *and plaintiff shall be barred thereby from asserting any further* rights, *claims*, or demands against the defendant and *any future action on the claims encompassed in Docket 320*, and shall finally dispose of all rights, claims, demands, payments on the claim, counterclaims, or offsets which defendant has asserted or could have asserted against plaintiff in Docket 320 and defendant shall be barred thereby from asserting against plaintiff in any future action any such rights, demands, payments on the claim, counterclaims, or offsets.

The United States and the Tribe concede, as they must, that the Tribe's 1951 petition in Docket No. 320 included a clearly stated claim that the disputed boundary lands had been wrongfully taken by the United States under the 1893 Agreement. U.S. Br. 19; Tr. Br. 8-9. That claim was never withdrawn or amended, not even after the issuance of the 1978 Secretarial order which purported to void the 1893 Agreement which was the basis of the Tribe's claim and which the United States now contends made that claim "largely moot." U.S. Br. 26. It remained extant on August 9, 1983 when the Claims Court entered the settlement judgment drafted by the United

States and the Tribe providing that it "shall *finally dispose* of *all* rights, *claims*, or demands *which plaintiff has asserted* or could have asserted" and barring the Tribe "from asserting any further rights, claims or demands against the defendant and *any* future action on the *claims* encompassed in Docket No. 320." *Id.* at 66a-67a (emphasis added).

The Claims Court judgment could not be any clearer. There is no ambiguity.[15] There is no exemption or reservation of the Tribe's longstanding claim alleging the Government's "taking" of the disputed boundary lands by the 1893 Agreement.[16] *See, e.g., Western Shoshone National Council v. Molini*, 951 F.2d 200, 203 (9th Cir. 1991) ("absent some express reservation hunting and fishing rights are subsumed within an unconditional transfer of title" by "full title extinguishment" under a Commission judgment).[17] Consequently, the Special

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[15] If there were any ambiguity, the Court should apply "the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it." *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 62 (1995).

[16] Contrast the consent judgment in *Gemmill*, p. 11 *supra* (13 Ind. Cl. Comm. 369, 386 (1964) (emphasis added):

> 4. The stipulation and entry of final judgment shall finally dispose of all claims or demands which any of the petitioners and claimants represented in any of said dockets (*expressly excluding Dockets 80-A, 80-B and 80-C*) have asserted. . . .

[17] However, it is unlikely that the Tribe would have been permitted to delete or reserve its taking claim at that late date. In *Temoak*, p. 5, n.7 *supra*, the Claims Court affirmed a Commission judgment on a claim of taking of aboriginal title after it had denied the Tribe's request to abandon part of its taking claim so that it could assert that it still possessed aboriginal title to some of the land (593 F.2d at 998):

> "We think that when the defendant announces by statute

(continued...)

Master rightly assumed "that the Fort Yuma boundary lands being claimed by the Quechan Tribe in this litigation are within the land subject to the Court of Claims case, Docket No. 320" (Mem. Opin. No. 4 at 9) and correctly held that the Tribe's pre-1893 beneficial interest in those lands was conclusively extinguished by payment of that judgment and cannot form the basis for the present claim for a reserved water right for those lands. That conclusion is supported not only by the plain language of the judgment, but by the several decisions

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[17] (...continued)
or regulation a procedure for presenting and deciding claims against it of some particular kind, and when a claimant files a petition in the manner and form prescribed, that is the procedure to be followed. The implied obligation of the claimant is to state his claim and stick to his statement, and to prosecute his claim diligently to adjudication, so that it can be paid and the government relieved of the threat of it as a thunder cloud in the sky. . . . There can be no doubt that Congress passed the [ICC Act] with the object of drawing in all claims of ancient wrongs, respecting Indians, and to have them adjudicated once and for all. . . . It provided in Section 22 that payment of a claim as assessed under the Act would discharge not only the specific claim made, but all claims and demands touching any of the matters involved in the controversy. [The Congressional objectives] are frustrated by continued delay in adjudication of claims.

The court also noted that "if the Indians *desire to avert the extinguishment of their land claims by final payment*, they should go to Congress as recommended in *Western Shoshone*, 531 F.2d at 503, n.16 . . ." *Id.* at 999 (emphasis added).

It is significant that the Tribe and the United States did not call the alleged reservation of the Tribe's claim that it beneficially owned the disputed boundary lands to the attention of the Claims Court when they sought approval of the stipulated judgment in 1983. Perhaps it was because they already knew what the Claims Court's answer would likely be in light of its *Temoak* decision only four years earlier.

explicating the "statutory preclusion" effect of such judgments (pages 11, 16 *supra*) on which the Special Master relied (Mem. Opin. No. 4 at 10; Mem. Opin. No. 7 at 6):

> If the boundary lands claim of the Quechan Tribe here are lands also the subject of and part of Court Claims Docket No. 320, and I assume that this is so, the above quoted language [in the 1983 judgment] precludes the Quechan Tribe from water rights claims based on boundary lands claims in this case.
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> * * *
>
> Therefore, it must be concluded that by virtue of the Court of Claims settlement and the money received by the Quechan Tribe as the result of that settlement, the Tribe is precluded from further boundary claims as to the Fort Yuma Reservation, and is thus precluded from asserting claims in this proceeding.
>
> * * *
>
> Docket No. 320 extinguished the Quechan Tribe claim to the land, and any claim to water rights, depending as such claim does on the ownership of the land, was also extinguished. The case of *United States v. Gemmill*, 535 F.2d 1145 (9th Cir.); *cert. denied*, 429 U.S. 982 (1976) and *Kalispel Indian Tribe v. Pend Oreille*, 926 F.2d 1502 (9th Cir. 1991), *cert. denied*, 112 S.C. 415 (1992) support this conclusion.

Thus, it is clear that the Special Master understood both the applicable facts and applicable law, and made his decision accordingly.

C. The Special Master Properly Rejected the Extrinsic Evidence Relied on by the United States and the Tribe to Exclude the Tribe's Taking Claim for the Disputed Boundary Lands from the Claims Court Judgment

If the United States' and the Tribe's intent in settling the Docket No. 320 proceeding was as they now contend, it is simply inconceivable that it would not have been (1) reflected in a further amendment of the Tribe's 1951 petition for relief before the Commission (as had been done in 1958) to delete their takings claim following the 1978 Secretarial order, (2) explained to the Claims Court in the stipulation submitted in support of the settlement judgment, or (3) expressly addressed in the judgment they drafted by a reservation excepting the Tribe's takings claim on the contingency that the 1978 Secretarial order might be invalidated in some judicial forum (a very reasonable likelihood given the three prior Solicitors' opinions to the contrary!). None of these obvious, logical, simple steps was taken. Instead, the Court is invited to decipher the United States' and the Tribe's hidden intent and read it into the Claims Court judgment by strained inferences from several background documents. The Court should decline the invitation, as the Special Master did, because such a result would defeat the finality goals of the ICC Act and violate the parol evidence rule.

Ninety-three years ago this Court fashioned a rule governing the interpretation of agreements that purport to resolve "all claims:" "If parties intend to leave some things open and unsettled, their intent to do so should be made

manifest." *United States v. William Cramp & Sons Ship and Engine Building Co.*, 206 U.S. 118, 128 (1907). The State Parties contend that the salutary principles of the parol evidence rule preclude the use of extrinsic evidence to alter the unambiguous language of the judgment drafted by the United States and the Tribe.

This Court's decision in *United States v. Southern Ute Tribe*, 402 U.S. 159 (1971), is also instructive. That case involved a Government defense that the Tribe's claim was barred by res judicata as a result of a prior Court of Claims consent judgment which provided that it was in "full settlement and payment for the complete extinguishment of [the Tribe's] right, title, interest, estate, claims and demands of whatsoever nature in and to the land and property in western Colorado ceded by plaintiffs to defendant by the Act of June 15, 1880." *Id.* at 160. The Government argued that the scope of the judgment should be determined solely from the face of the referenced 1880 Act, which it contended was unambiguous. The Commission, relying on extrinsic evidence, rejected the Government's res judicata defense. On appeal the Court of Claims remanded the case to the Commission "to get a better idea of exactly what the parties meant to stipulate in [the consent judgment], namely, what [land] they *then* thought was ceded by the Act of 1880." 423 F.2d 346, 357 (Ct.Cl. 1970) (emphasis in original). On remand the Commission again rejected the United States' contention that the consent judgment was self-explanatory and that the intent of the parties should be discerned solely from its language.

This Court reversed the Court of Claims interpretation of the 1880 Act to which the judgment referred (402 U.S. at 165-66):

> We disagree that the history relied on supports any of those bases for decision, even assuming (and we have serious doubts) that the plain words of the Act of 1880 can thus be varied to except the lands in suit from the phrase "any land . . . ceded" in the consent judgment.

It also "questioned the propriety" of the Court of Claims' remand to the Commission to hear additional evidence and make findings regarding "the intention of the parties to the stipulation upon which a final judgment was entered," citing *William Cramp & Sons*, *supra*, and *Delaware Indians v. Cherokee Nation*, 193 U.S. 127, 140-41 (1904). *Id.* at 174, n. 9. As the *Delaware Indians* decision noted: "We can perceive no room in this case for a departure from the familiar rules of the law protecting written agreements from the uncertainties of parol testimony." 193 U.S. at 141. A similar result is required by analogy to the rule of statutory construction which precludes the use of legislative history to vary the unambiguous language of a statute. *See, e.g., Oklahoma and Texas v. New Mexico*, 501 U.S. 221, 232-33, 235, 247, *reh'g denied*, 501 U.S. 1277 (1991). Moreover, the general rule of construction favoring Indians in construing treaties and federal legislation designed to protect Indian interests is plainly inapplicable to create ambiguity where none exists,[18] particularly where, as here, the Tribe was represented by counsel, who coordinated closely with the tribal council and membership (U.S. Br. 60a-61a), and the possibility of unfair dealing was negated because of the Claims Court supervision of the proceedings.

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[18] *South Dakota v. Yankton Sioux* Tribe, 522 U.S. 344, 349 (1998); *South Carolina v. Catawba* Tribe, 476 U.S. 498, 506 (1986); *DeCoteau v. Dist. County Court*, 420 U.S. 425, 447, *reh'g denied*, 421 U.S. 939 (1975).

D. The Special Master's Decision Was Properly Grounded on Statutory Preclusion, Not Collateral Estoppel

The United States and the Tribe erroneously analyze the legal effect of the Claims Court judgment solely in the context of common law principles of collateral estoppel. However, the preclusive effect of a judgment under the ICC Act stems from the purposes and unique procedures of that Act to bring finality to Indian claims, as this Court and the Ninth Circuit concluded in the *Dann* litigation (pages 11-16 *supra*). Although the United States, surprisingly, does not even address the "statutory preclusion" cases relied on by the Special Master (page 21 *supra*), its silence speaks volumes. It focuses instead on an intermediate state appellate court decision, *New Mexico v. Kerr-McGee*, 898 P.2d 1256 (N.M. Ct. App. 1995), citing it no less than five times. U.S. Br. 36, 38, 39, 40, 41. However, not only is its parenthetical description of the decision (*id.* at 39) not accurate, but the Commission case involved there was significantly distinguishable from the Docket No. 320 proceedings.

New Mexico involved separate claims filed with the Commission by the Laguna and Acoma Pueblos seeking compensation from the United States for (1) "permanent loss of aboriginal lands and appurtenant water rights" ("aboriginal lands"), and (2) "loss of irrigation waters appurtenant to lands *within* Pueblo boundaries ("retained lands")," but not loss of the "retained lands" themselves. *Id.* at 1258 (emphasis in original). Following the liability phase of those proceedings the Commission issued interlocutory decisions finding that the title to the Pueblos' *aboriginal* lands and appurtenant water rights had been extinguished, but that the Pueblos had failed to prove that federal action had taken or interfered with the water rights on the *retained* lands. *Id.* The Commission later struck

its findings relating to "the absence of proof of the loss of water" on the *retained* lands. *Id.* at 1262. Subsequent settlement judgments contained language "disposing of all [Pueblo] rights, claims or demands" similar to that in the Docket No. 320 judgment. 23 Ind. Cl. Comm. 219, 232 (Acoma); 24 Ind. Cl. Comm. 197, 202 (Laguna).

In a later water rights adjudication in state court, the Pueblos sought to establish their rights for irrigation water on the *retained* lands. The State of New Mexico persuaded the trial court that the comprehensive language of the settlement judgment had extinguished those water rights. The New Mexico Court of Appeals reversed. However, its decision dealt only with whether the Pueblos' water rights on the *retained* lands had been extinguished, not the water rights appurtenant to the *aboriginal* lands. As a careful reading of the *New Mexico* decision illustrates, the United States' description of it as "rejecting the argument that a compromise judgment of *land claims* under the Indian Claims Commission Act precluded the Tribe [sic] from litigating its water rights *respecting those lands*" (U.S. Br. 39, emphasis added) is plainly not correct. The court only rejected the State's argument that the claim for water rights for the *retained* lands was precluded by the settlement judgment. There was no dispute that the claim and title to the *aboriginal lands and appurtenant water rights* had been extinguished, 898 P.2d at 1262, which are the equivalent of the Quechan Tribe's claim for the disputed boundary lands and impliedly "appurtenant" *Winters* reserved water rights in their 1951 petition.

Unlike the United States, the *New Mexico* decision recognized that three different theories have historically been applied to give preclusive effect to Commission judgments — res judicata, collateral estoppel, and "general statutory preclusion derived from case law and based on the theory that

the Indian Claims Commission Act . . . was designed to resolve Indian land questions once and for all," 898 P.2d at 1259. It first held that *res judicata* did not preclude assertion of the Pueblos' water rights claims for the *retained* lands against other water users because such claims could not have been brought before the Commission, 898 P.2d at 1259-60. Next it held that those claims were not precluded by collateral estoppel because the Commission's interlocutory decisions and findings made it clear that the United States had *not* taken the water rights on the *retained* lands, *i.e.*, that the issue was not "actually and necessarily determined by the ICC." *Id.* at 1262. The court rejected the State's argument that the Commission's action should be ignored because the "settlements contradict the initial findings of the ICC to the effect that the United States was *not* liable for loss of water on the retained lands." *Id.* at 1263 (emphasis in original).

As to the "statutory preclusion"cases, it noted that they were the majority of cases "that have given preclusive effect to prior ICC proceedings" and were based on the theory "that Congress created a statutory method of preclusion for the particular subject matter." *Id.* However, it concluded that the "same rules applicable to issue preclusion analysis should apply to the statutory preclusion theory" (*id.* at 1263-64), which conflicts with the decision in *Dann II*, impliedly later sanctioned by this Court, that the Act's statutory scheme superseded the requirements of common law preclusion rules.

The critical distinction between the Laguna/Acoma Pueblos proceedings and the Tribe's Docket 320 proceedings is that the liability issues had actually been litigated and Commission decisions rendered with specific findings on the Pueblos' claims, which was not the case in Docket No. 320. Had there been a similar interlocutory decision and findings on

the Tribe's claims,[19] such formal Commission action would have to be looked to in identifying the claims that were being settled because section 20(b) of the Act provides that such findings if "supported by substantial evidence . . . shall be conclusive." App. 2a. This is *not* this case. Most important, Congress plainly intended settlement judgments to have the same preclusive effect whether or not they were preceded by earlier litigation and a Commission decision and findings. See page 10 *supra*.

The other case relied on by the United States, *Devils Lake Sioux Tribe v. North Dakota*, 917 F.2d 1049 (8th Cir. 1990) (U.S. Br. 39), is readily disposed of. The United States accurately describes the Commission settlement judgment at issue there as "ambiguous," which a reading of the decision makes clear is an understatement. In contrast, in Docket No. 320 there is no ambiguity in the 1983 Claims Court judgment or the claims set out in the Tribe's petition, nor is there any intervening Commission decision and findings circumscribing or modifying those claims in any way.

E. The Several Documents Relied on by the United States and the Tribe Do Not Support Their Alleged Intention to Exclude the Tribe's Taking Claim from the Claims Court Judgment

Not only would it be inappropriate to use the extrinsic evidence relied on by the United States and the Tribe to alter the language of the Claims Court judgment, but the several documents they rely on do not justify the revision they seek.

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[19] Although there had been a trial on the liability issues in Docket No. 320, the proceedings were suspended and a decision and findings on liability issues were never entered (p. 4 *supra*).

Ignoring the critical documentary components of Docket No. 320, *i.e.*, the language of the settlement judgment and the Tribe's petition enumerating its claims, they focus instead on (1) the 1978 Secretarial order, (2) some irrelevant pretrial fact stipulations, (3) an Acting Deputy Assistant Secretary of the Interior's letter approving the settlement, and (4) (the Tribe but not the United States) a letter to the Tribe from its counsel explaining the proposed settlement which the Tribe approved. It is significant that the United States offered no evidence as to the motivation, understanding or intent of the Attorney General regarding the settlement, who is the only federal official authorized to settle claims under the ICC Act.

1. The 1978 Secretarial order

The United States argues that because the 1978 Secretarial order had purportedly restored the disputed boundary lands to the Tribe, the result was to "largely moot" (U.S. Br. 26) the Tribe's taking claim in its 1951 petition based on "a permanent uncompensated taking of those lands or . . . damages under a 'fair and honorable dealings' theory." *Id.* Thus, the United States contends, it would have been incongruous for the United States to have compensated the Tribe for any lands ceded by the 1893 Agreement other than those which had been excluded from the 1978 order to protect titles that had vested in third parties in the intervening 85 years. It argues that the settlement "judgment granted the Tribe monetary relief *on its outstanding claims* [and] necessarily rested on the Secretarial order." *Id.* at 30 (emphasis added). But if the $15 million settlement was not intended to include compensation for the Tribe's "outstanding claims" allegedly "mooted" because the lands had been administratively restored to the Tribe by the 1978 order, it was eminently reasonable for the Special Master to have assumed that this "extraordinarily important fact" would somehow have been called to the

attention of the Claims Court and clearly reflected in the settlement judgment (Rep. App. 2C, Mem. Opin. No. 7 at 2):

> If the Tribe, represented by the United States, was really settling only title to lands other than those covered by the 1978 Secretary's Order, this extraordinarily important fact appears nowhere in the settlement record, despite the fact that the lands covered by the 1978 Order relied upon here were central to the Court of Claims case which was being settled.[20]
>
> The plain and unambiguous effect of the settlement and Order of 1984 [sic] cannot be modified by speculation as to what the parties meant or by inferences as to their intent drawn from other documents. And if the Secretary's order of 1978 had an impact on the earlier filed and later settled Quechan Tribes' Court of Claims case, as the United States now argues, that fact nowhere appears in an unambiguous settlement agreement approved by the Court and thus made the final Order in the case. In the absence of ambiguity, the law barring parole evidence is too well settled to require citation.

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[20] The United States told the Claims Court that "the principal issue in Docket No. 320 is whether plaintiff has had title to the 25,000 acres of [disputed boundary lands] since 1894. . . ." (p. 36 *infra*). Consequently, based on that same premise, the Special Master did not "misstate" the United States' argument below when he observed that "the United States certainly did not pay $15 million to the Quechan Tribe to settle a Court of Claims case which it believes was not pending because it had been mooted by a Solicitor's ruling many years before," as the United States alleges. U.S. Br. 34-35.

The Special Master's view that the language of the settlement judgment was all encompassing also seems to be shared by the current counsel for the Tribe:[21]

> The petitions in Docket 320 asserted both taking and trespass damages. Upon trial, the Tribe could have obtained takings damages, implying that title was in the United States. Or, the Tribe could have obtained trespass damages, implying that title remained in the Tribe. . . . The settlement was not premised on one theory over the other. Nor can one conclude from the stipulated settlement that Reservation boundaries, land title and water rights were to be affected.
>
> *One obvious question is, what could the settlement have been for? This does not appear from the record in the case*. The funds paid to dismiss the claims of the Tribe against the United States in Docket 320 could have been for a number of things, including damages for trespass on Indian land, or damages due to the building of the All-American Canal (unlined canals are notoriously damaging to surrounding areas), or damages in the nature of trespass for use of tribal water, *or taking of land or water*, to name a few. In other words, it could have been for any number of things. However, the Special Master's assumption that it was for the diminishment of the Reservation or the reduc-

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[21] Tr. Br. 21 (emphasis added). The Tribe has been represented by different counsel in the Claims Court proceedings, before the Special Master, and now before this Court.

> tion of the Reservation assumes far more than is indicated anywhere on the face of the stipulation or the relevant pleadings in Docket 320.

The simple answer to the Tribe's question, in the language of the settlement judgment, is "all" of the above.

The State Parties dispute the United States' representation that "the United States clearly and consistently made those points [it now makes] before the Master," but that the Special Master nevertheless "had a flawed understanding of the Claims Court judgment." U.S. Br. 34, 35. The United States *never* explained why the language of the 1983 judgment did not reflect the alleged intent to exclude compensation for the Tribe's takings claim. Moreover, the State Parties are constrained to note that the arguments presented by the United States and the Tribe below might well have caused a less experienced judge some puzzlement, as they did the State Parties. Indeed the subtleties of the United States' argument still remain difficult to fathom even with the benefit of the Solicitor General's rehabilitative efforts.

When all is said and done, the question the Special Master asked the United States and the Tribe remains unanswered — why wasn't the alleged intention of the parties to exclude the Tribe's taking claim with respect to the disputed boundary lands because of the 1978 Secretarial order reflected in the judgment they drafted? In any event, the Special Master had a clear grasp of the settlement judgment's plain language and the Tribe's claims which it "disposed" of, as revealed in the Tribe's petition. Consequently, he properly ruled that the 1978 Secretarial order is irrelevant to interpretation of the Claims Court judgment. Rep. App. 2B, Mem. Opin. No. 5.

2. The critical impact of the *Arizona II* decision

The United States' assertion that "the [1978] Secretarial order fundamentally altered the posture of the [Claims Court] case" (U.S. Br. 25) may have been true for awhile. Of far greater and controlling significance, however, but only adverted to by the United States in passing (*id.* at 26, 28, 31), was how this Court's subsequent 1983 decision in *Arizona II* that the 1978 Secretarial order was not a "final determination" for water rights purposes until it had been subjected to judicial review dramatically changed the United States' view of the case. Although the United States repeatedly asserts that the settlement was premised on its agreement with the Tribe that the 1978 Secretarial order had restored the Tribe's title to the disputed boundary lands (U.S. Br. 30, 32, 34), that premise was abandoned after the *Arizona II* decision. Instead, both parties then recognized that the Secretarial order might be overturned in the district court litigation pending in San Diego, or elsewhere, a contingency that posed substantial risks to both the Tribe and the United States. U.S. Br. 28-29; Tr. Br. 24-25. Consequently, the scope of the proposed settlement changed significantly in that "all" of the Tribe's claims were ultimately settled without reservation of any contingent claims that might be asserted if the 1978 Secretarial order was invalidated.

The *Arizona II* decision was rendered on March 30, 1983, but the United States has presented only a truncated, incomplete discussion of what transpired in the Claims Court proceedings immediately thereafter. *Id.* at 28-30. Less than a month later, on April 20, 1983, the Tribe authorized its counsel to settle "the *claims* in Docket No. 320" for not less than $15 million. *Id.* at 50a (emphasis added). On April 28, 1983, the United States filed a "Motion to Stay Proceedings Pending Determination of Ownership" seeking to stay the damages

phase of the proceedings set to begin on June 20, 1983 "pending 'final determination' of the issue of the boundaries (and ownership) of the Fort Yuma Indian Reservation in *Metropolitan Water District v. United States*, Civ. No. 81-0678-GT(M) [then pending in the United States District Court for the Southern District of California]."[22] The United States plainly no longer assumed that the 1978 Secretarial order had *finally* resolved the title to the disputed boundary lands, a development that apparently made the Tribe's pending settlement offer unattractive.

In support of its motion the United States alleged as follows (*id.* at 4, emphasis added):

> 11. In Docket 320, the government's liability to the Quechan Tribe turns in very substantial part upon the issues of the ownership of the land in 25,000 acres and the 5,300 acres of accreted land, which were the subject of the 1978 order of the Secretary of the Interior. If that order is upheld the United States is liable for damages. *If, however, the secretary's order is determined to be invalid or legally or factually incorrect the liability of the United States would result in but a much smaller award of damages.*[23]

* * *

[22] "Renewed Motion for Reconsideration of the Quechan Tribe of Indians" (March 23, 1993) ("Ren. Mot."), Exh. 2.

[23] This was because the barren, desert land was "of limited value," as the Tribe acknowledges. Tr. Br. 25. *See also Temoak*, 593 F.2d at 996.

> 12. *It is the position of the United States that it mistakenly took the view that the ruling of the Special Master in Arizona v. California, which accepted the finality of the 1978 Order of the Secretary of the Interior, had resolved the issue of the Quechan Tribe's ownership of the Fort Yuma Indian Reservation.*
>
> 13. *Because of the reversal of the Special Master's ruling by the Supreme Court, there is no basis for the United States to agree to the tribe's ownership of the land* and thus no basis upon which the United States can continue to agree that it is liable for damages in the form of the sale and rental value of the 25,000 acres original and 5,300 acres of accreted land.

The Tribe opposed the United State's motion, arguing that the Secretary's order was final as between the United States and the Tribe and disagreeing with its assessment of the significance of *Arizona II*. Ren. Mot., Exh. 3.

The United States' reply on May 9, 1983 (Ren. Mot., Exh. 4) reiterated that its prior assumption that the 1978 Secretarial order had restored the Tribe's title to the disputed boundary lands had been "mistaken" (*id.* at 3-8, emphasis added) :

> *In light of the Arizona v. California opinion, it appears that the Government's reliance on the Secretary's 1978 order to resolve the issue of title was mistaken.* The doctrine of estoppel does not bar the Government from correcting a mistake of law.

* * *

Defendant submits that plaintiff's interpretation of the Supreme Court's ruling [in *Arizona II*] is erroneous. First, the amount of water which the Quechan Tribe is entitled to divert from the Colorado River depends on the amount of "irrigable acreage" within the reservation. The amount of "irrigable acreage" rests, in turn, on the amount of land within the Fort Yuma Reservation which the Quechan Tribe owns. *The issues of the quantum of water rights and title to land are intertwined.* . . . Accordingly, if (as plaintiff contends) the opinion in *Arizona v. California* casts doubt on the conclusiveness of the 1978 order with respect to the matter of water rights, the opinion must necessarily also cast doubt on the 1978 order with respect to the issue of title to the 25,000 acres of original land (and the 5,300 acres of accreted land).

The principal issue in Docket No. 320 is whether plaintiff has had title to the 25,000 acres of original land since 1894, not whether the 1978 Secretarial order restored title to this land. The issue of title is for the courts and the 1978 order cannot deprive the District Court for the Southern District of California of the jurisdiction to rule on validity of the order.

Plaintiff asserts that damages which may be awarded to the Quechan Tribe in Docket No. 320 will not be affected by the litigation in the *Metropolitan Water District* case. *Defendant submits that should the District Court rule that*

> *the Secretary's 1978 order was not valid, then such a ruling would have a direct and immense impact on Docket No. 320* [because] potential damages would be drastically reduced. This is because damages are premised on conveyances of this land to third parties and leases of this land by third parties between 1894 and the present.

Judge Kozinski denied the motion to stay, without opinion, on May 10, 1983, but allowed the United States "to reopen the question of its liability, preferably after the June 20, 1983, trial on damages." Ren. Mot., Exh. 5. Consequently, the parties prepared for trial in sharp disagreement over whether or not the 1978 Secretarial order had "made" the Tribe's "takings" claim in its petition "largely moot," as the United States now claims. U.S. Br. 26.

3. The May 26, 1983 pretrial stipulations

On May 25, 1983, Richard Beal, counsel for the United States, wrote counsel for the Tribe commenting on the Tribe's proposed pretrial fact stipulations with regard to the effect of the 1978 Secretarial order (Ren. Mot., Exh. 12, emphasis added):

> Enclosed are a copy of the Joint Memorandum Re: Stipulations which you furnished to me. I have made proposed changes with respect to some of the stipulations. I decline to stipulate to No. 8 and I suggest one additional stipulation. I complete the statement with respect to the 6,199 acres on the Mesa. I assume you can put all of this together in a

revised Joint Memorandum today and return it to me so it can be filed tomorrow.

1. Defendant does not stipulate to paragraph 8 and proposes a modification of paragraph 9 because the Secretary's order may be ruled incorrect, improper, and/or invalid insofar as it purports to rule that boundaries of the Fort Yuma Reservation have never changed. This is an issue that should be determined by the District Court for the Southern District of California in Docket Civ. No. 81-0678-GT(M).

The significance of the issue is substantial and one the Department of Justice cannot waive by stipulation. The issue is not whether the tribe today owns the land, but whether the land has ever been out of the tribe's ownership. *The difference is that if the land was conveyed from and by the tribe to the United States as a result of the 1893 agreement and Act of Congress, the land was conveyed in 1893 and should be valued at that time.* Here land has been valued at the time of conveyance, by patent, grant or permanent utilization for levees, canals, road etc. . . .

The following day, the Tribe and the United States filed a "Joint Memorandum re Stipulations" (U.S. Br. App. 35a) on which they principally rely to support ignoring the unambiguous language of the ultimate Claims Court judgment. U.S. Br. 27-29; Tr. Br. 12-13. Although Stipulations 4 and 5 noted the *intent* of the 1978 Secretarial order, Stipulation 8 recognized its contingent legality: "*[i]f* the December 20, 1978 secretarial order is upheld, *there are no remaining issues*

as to liability of the United States for the acquisition of portions of the Quechan Reservation" (U.S. Br. App. 37a). This stipulation seems to be in direct conflict with paragraph 15 of the stipulations, which reiterates the identical language and then notes that "The United States is unable to so stipulate because the Supreme Court opinion in *Arizona v. California* states that there must be a judicial determination of the Quechan boundary." *Id.* at 40a. The negative implications of the Tribe's proposed stipulation, *i.e.*, if the 1978 Secretarial order should be overturned there *would* be remaining liability issues, were clear to the United States, as it had explained in its rejected motion to stay the proceedings (pages 34-35 *supra*). Thus, the pretrial stipulations, both on their face and read against Mr. Beal's representations to the Claims Court in his rejected stay motion (page 35 *supra*) and his letter of May 25, 1983 (pages 37-38 *supra*), plainly conflict with the United States' assertion that:[24]

> The Master's reasoning overlooks the fact that the United States and the Tribe entered into a settlement precisely *because* they now agreed, in light of the Secretarial Order, that the Tribe owned the land in question.

On May 27, 1983, and May 31, 1983, the United States and the Tribe submitted their pretrial memoranda. Ren. Mot., Exhs. 6 and 9. On June 8, 1983, the parties appeared before Judge Kozinski for a pretrial conference. *Id.* at Exh. 13.

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[24] U.S. Br. 34 (emphasis in original). *See also id.* at 30 ("[t]he United States' payment [of $15 million] necessarily rested on the Secretarial Order, which recognized that the Tribe owned the disputed boundary lands. . . ."); *id.* at 32 ("both the United States and the Tribe agreed [that the disputed boundary lands] continued to be held by the United States in trust for the Tribe.").

Settlement possibilities were apparently discussed by the parties over the next few days (*id.* at 13-16) and the United States initially offered to settle for $13.5 million. U.S. Br. App. 46a. That offer was rejected by the Tribe, but counsel for the parties on June 15, 1983, agreed on a payment of $15 million in "settlement of the *claims* in Docket 320," which the Tribe accepted on June 16, 1983. *Id.* at 46a-47a (emphasis added). By letter of July 8, 1983, the Attorney General formally accepted the Tribe's offer to settle for $15 million, subject to certain conditions, including the following (Ren. Mot., Exh. 14):

> 4. That the judgment entered pursuant to this settlement shall finally dispose of all claims which the tribe has asserted or which the tribe could have asserted against the defendant under the Indian Claims Commission Act in Docket No. 320.

Inasmuch as Mr. Beal was Chief of the Indian Claims Section in the Department of Justice (*id.* at Exh. 12), it must be presumed that he was aware of the broad preclusive effect of judgments under the ICC Act, particularly since *Gemmill*, page 11 *supra*, had been decided in 1976, *Temoak*, page 5 *supra*, in 1979, and *Dann II*, pages 12-13 *supra*, only a few months earlier in May 1983.

Thus, whatever the intent or legal significance of the pretrial stipulations may have been on May 26, 1983, they were followed by apparently intensive settlement negotiations over a few days which ultimately resulted in the "Stipulation for Settlement and Entry of Final Judgment" filed with Judge Kozinski on August 5, 1983, based on a completely different premise as to the validity of the 1978 Secretarial order. *Id.* at 42a. Although that formal *settlement* stipulation attached four

supporting documents, it did not include or even reference the 1978 Secretarial order or the earlier *pretrial* stipulations. Consequently, there is no discernable linkage between the May *pretrial* stipulations and the August *settlement* stipulations included in the proposed settlement judgment, which were the result of subsequent negotiations. Therefore, it is not surprising that the final judgment did not refer to the *pretrial* stipulations as limiting, in any way, its preclusive effect on "*all* rights, *claims* or demands *which plaintiff has asserted* or could have asserted" by the Tribe in that proceeding. *Id.* at 66a-67a. Indeed, even if the *pretrial* stipulations had been submitted they would probably have confused Judge Kozinski, just as counsel for the United States had seemingly done in trying to explain the significance of the decision in *Arizona II* relating to the 1978 Secretarial order during the pretrial conference on June 8, 1983. Ren. Mot., Exh. 13 at 7-13.

4. The Tribe's counsel's letter of July 6, 1983

The proposed settlement required approval by the Tribe's general membership, so a general membership meeting was scheduled for July 8, 1983. On July 6, 1983, in preparation for that meeting, Mr. Raymond Simpson, the Tribe's counsel at the time, wrote to the president of the Quechan Tribal Council explaining his rationale for the settlement. Tr. Br. App. 8a. That letter (relied on by the Tribe, but not the United States) is even less supportive of the Tribe's attempt to rewrite the Claims Court judgment by unfounded inferences. Indeed it supports the State Parties' contention that the Tribe decided, after this Court's decision in *Arizona II* (in which Mr. Simpson had also represented the Tribe) and the refusal of the United States to stipulate that the 1978 Secretarial order had finally settled the title to the disputed boundary lands (pages 37-38 *supra*), that the validity of the suspect 1978 Secretarial order

might well be in jeopardy. Consequently it apparently seemed best to Mr. Simpson to obtain what he could from the United States in settlement of *all* of the Tribe's original claims, perhaps hoping that the Tribe might nevertheless be able to obtain a water rights windfall if the 1978 Secretarial order should survive the then pending challenge in the United States District Court in San Diego. Thus, he advised the Tribe as follows (Tr. Br. 12a, emphasis added):

> We were seriously concerned, also, with the consequences of the decision of the United States Supreme Court in *Arizona v. California*, where the Supreme Court refused to accept the Special Master's recommendation of additional water rights for the Quechan Tribe. The Supreme Court held that there must first be a court decision as to whether the Secretary of the Interior was correct in his 1978 order restoring the 1884 boundaries of the reservation. *The United States argued that if the boundary question were decided against the Quechans, the tribe might lose its land and, with it, most of its claimed damages.* We opposed the delay and the United States Claims Court refused to delay the trial, but *we were gravely concerned that the ultimate outcome of any court decision on boundaries might seriously jeopardize your claims case. We therefore welcomed the opportunity to settle it at this time, thereby avoiding the risks involved in any subsequent litigation over boundaries.*

The United States had helped Mr. Simpson's decision along by increasing its settlement offer from $13.5 million to $15 million. U.S. Br. 46a. This seems to have been a very

good deal for the United States as well. Although the United States now states cryptically that the Tribe's settlement proposal "resolved the United States' concern about *continuing liability* if the Secretarial order were invalidated in collateral litigation" (U.S. Br. 29, emphasis added), it does not explain how. The answer is that although pretrial stipulation No. 8 in May would have impliedly *reserved* all existing and potential claims against the United States on the contingency that the 1978 Secretarial order might be overturned (pages 38-39 *supra*), the Tribe apparently reversed field in the settlement discussions and agreed to waive *all* of its pleaded and potential claims. This would include any claims for lost *Winters* water rights impliedly appurtenant to the lands ceded under the 1893 Agreement, a claim that was not expressly included in its original or amended petition. Consequently, although the value of the disputed boundary lands in 1893 would have been minimal, the related contingent, lurking lost water rights claim against the United States, possibly a very valuable one,[25] appears to also have been waived by the Tribe in the settlement.

5. The Acting Deputy Assistant Secretary's letter of July 27, 1983

The United States and the Tribe also rely on a letter of July 27, 1983 from an Acting Deputy Assistant Secretary of the Interior - Indian Affairs (Operations) approving, as trustee for the Tribe, the proposed settlement. They contend that its statement that the "case involves claims of the Quechan Tribe *for damages for the taking of parts of their reservation after 1893* and the loss of use of other parts of the reservation from 1893 to 1978," *id.* at App. 59a (emphasis added), reflected the

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[25] An annual right to divert 71,519 acre-feet of water with a priority date of 1884 would currently be highly valuable in the lower Colorado River basin. What it would have been worth in 1893 is very speculative.

limited issues allegedly remaining before the Claims Court in 1983 as a result of the 1978 Secretarial order. U.S. Br. 30-31; Tr. Br. 13-14. But, here again, it does not say so. Indeed the emphasized portion accurately describes the Tribe's takings claim alleged in its petition for relief (pages 3-4 *supra*). Moreover, the letter is internally inconsistent. Thus, after allegedly characterizing the case as no longer encompassing the Tribe's total taking claim, it then reiterates the condition required by the Attorney General (page 40 *supra*) that "entry of judgment in this case shall finally dispose of *all claims which the tribe has asserted or which the tribe could have asserted* against the defendant under the Indian Claims Commission Act in Docket No. 320." U.S. Br. App. 60a (emphasis added).

F. The Fact That the Claims Court Judgment Was a Settlement Judgment and Contained a Disclaimer as to its Precedential Effect in Other Litigation Does Not Negate its Extinguishment of the Tribe's Title to the Disputed Boundary Lands

The United States and the Tribe further argue that, even if the Tribe's claim and title to the disputed boundary lands were extinguished as against the United States by payment of the Claims Court judgment, the Tribe somehow unexplainedly retained a beneficial interest in those lands so that both parties could later pursue claims against third parties, including the Tribe's present water rights claim against the State Parties based on alleged ownership of those lands. They contend that the Claims Court judgment can have no preclusive effect on the Tribe's claim before this Court because it contains a clause providing that it "shall not be construed as an admission by either party for the purposes of precedent or argument in any other case." U.S. Br. 31; Tr. Br. 20. The illogic and

mischievous consequences of that argument did not escape the Special Master (Mem. Opin. No. 7 at 4, 7, emphasis added):

> In addition, the United States and the Tribe argue that whatever the effect of the final disposition of Docket No. 320, it cannot be relied on by parties not involved in that litigation since it governs only claims against the United States. The Tribe concedes that the settlement and payment of money forever bars the Quechan tribe from further claims against the United States as to this reservation land, but contends that the settlement has no preclusive effect as to third parties, unless the issue was the same in the present action, was actually litigated and is essential to a prior final judgment.
>
> This position mandates the conclusion that the United States, having acquired title to the lands in question and having settled claims against it as to the validity of that acquisition, may now, as adjudicated title holder, denigrate its title position for the benefit of the Tribe and to the detriment of others in this litigation because those others were not involved in the earlier litigation. This argument is without merit. Title to land is absolute. It is in the title holder as to the world, and cannot be asserted as to some parties and denied as to others.
>
> * * *
>
> [T]o accept the contention that a final judgment based on compromise has no real finality

> because it is not precedent in any other case *between the same parties* is to destroy the finality of judgments.

The United States' *ipse dixit* that the disclaimer language "recognized . . . that the Secretarial order would be subject to judicial challenge by third parties in other fora [and] *expressly* affirmed the parties' understanding that the judgment, based on a compromise rather than adjudication of the issues, would not affect the parties' ability to litigate related issues — such as reserved water rights — in other fora" (U.S. Br. 31, emphasis added) is a remarkably bold procrustean stretch that was not made before the Special Master and has absolutely no basis.

The disclaimer language was and is traditional boilerplate designed to protect the parties in future litigation *between themselves* and should be construed to apply only to the United States and the Tribes. It would be grossly unfair and contrary to public policy to permit the parties to a settlement agreement to bar third parties from relying on facts and legal principles apparent from the face of a final judgment. Most significantly, substantially identical language in the settlement judgments involved in the *Gemmill* and *Pend Oreille* cases on which the Special Master relied (page 21 *supra)* did not bar the utilization of those judgments in later litigation involving third parties.[26]

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[26] "5. The stipulation and judgment shall not be construed as an admission of either party as to any issue, for purposes of precedent in any other case." 12 Ind. Cl. Comm. 141, 142 (*Pend Oreille*);

"6. The stipulation of final judgment shall not be construed as an admission of any party as to any issue for purposes of precedent in any other case." 13 Ind. Cl. Comm. 369, 386 (*Gemmill*).

The United States' companion argument that a *Winters* reserved water right claim may be asserted against the State Parties because "[n]othing in the judgment purports to bar either the United States or the Tribe from asserting *different* claims against *other* parties in *other* fora" (U.S. Br. 37, emphasis in original) must be viewed as disingenuous. Although the Tribe's claim to title to the disputed boundary lands and its claim for a reserved water right for those lands may be technically "different claims," the United States well knows "that the issues of the quantum of water rights and title to land are intertwined," as it argued in its motion to stay the Claims Court proceedings (page 36 *supra*). Thus the Special Master was right on target when he concluded that "Docket No. 320 extinguished the Quechan Tribe claim to the land, and any claim to water rights, depending as such claim does on the ownership of the land, was also extinguished" (page 21 *supra).*

Finally, the United States and the Tribe err in equating the statutory preclusion principles of the ICC Act with common law principles of collateral estoppel and arguing that consent judgments, not having been litigated, are not subject to the defense of issue preclusion. U.S. Br. 38-39; Tr. Br. 17-20. Whether or not that may generally be true in the application of collateral estoppel, the courts have made no such distinction between litigated and settlement judgments under the law unique to the ICC Act, consistent with the mandate of section 15 that settlement judgments "shall be subject to the [payment bar] provisions of section 22" (page 10 *supra*). Indeed, the two leading cases relied on by the Special Master holding that such judgments extinguish any underlying Indian title claims involved settlement judgments very similar to the judgment in

Docket No. 320.[27] The Tribe's attempt to distinguish those cases on the ground that the Commission had made findings of fact and conclusions of law in each of them, whereas the Claims Court did not do so in Docket No. 320 (Tr. Br. 25, 27), should be rejected. Not only is there no such distinction in the ICC Act, but the Claims Court judgment's reference to "*all* rights, *claims*, or demands *which plaintiff has asserted*" make those claims fully ascertainable from the Tribe's petition. Moreover, where a case is finally disposed of by a settlement judgment and there is no formal Commission decision or findings to look to for further guidance, the United States,

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[27] *United States v. Gemmill*, 535 F.2d 1145 (9th Cir.), *cert. denied*, 429 U.S. 982 (1976), involved a final Commission judgment based on the following"Stipulation for Compromise and Settlement and Entry of Final Judgment:"

> 4. This stipulation and entry of final judgment shall finally dispose of all claims or demands which any of the petitioners and claimants represented in any of the said dockets . . . have asserted or could have asserted against defendant in any of the said cases . . . and petitioners (and all claimants represented thereby), and each of them, shall be barred from asserting all such claims or demands in any future action.

Thompson, et al. v. United States, 13 Ind. Cl. Comm. 369, 386 (1964).

United States v. Pend Oreille Pub. Util. Dist. No. 1, 926 F.2d 1502, 1507-08 (9th Cir. 1991), *cert. denied*, 502 U.S. 956 (1992), involved a final Commission judgment based on a "Stipulation to Compromise and Settle" and provided as follows:

> 3. The stipulation and entry of final judgment shall finally dispose of all claims or demands which petitioner has asserted or could have asserted in this case against defendant, and petitioner shall be barred from asserting all such claims or demands in any future actions.

The Lower Pend D'Oreille or Kalispel Tribe of Indians v. United States, 12 Ind. Cl. Comm. 141, 142 (1963); *see also Havasupai Tribe v. United States*, 752 F.Supp. 1471, 1481-82 (D. Ariz. 1990), *aff'd*, 943 F.2d 32 (9th Cir. 1991).

which has defended innumerable Indian claims before the Commission and the Claims Court over the last 50 years, has a statutory and professional duty to the courts, Congress, the public, and the affected Indian tribes to clearly reveal how those claims were resolved. There is no reasonable basis to conclude that the language of the settlement judgment in this case did not do so.

V. CONCLUSION

The Special Master did not "misunderstand" the unambiguous language of the Claims Court judgment, nor "misinterpret" the United States' argument below, nor "misapply" the law of claim and issue preclusion, as the United States contends. The State Parties' contentions as to the applicability of the parol evidence rule and the rather unique "statutory preclusion" effect of payment of judgments under the Indian Claims Commission Act were not refuted by the United States and the Tribe, and he correctly applied both legal principles. Therefore, the exceptions of the United States and the Tribe should be rejected and the Special Master's recommended decision and decree approved.[28]

Respectfully submitted,

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[28] The State Parties emphasize their strong support for the Special Master's recommended approval of the proposed settlements regarding additional water rights for the Fort Mojave and Colorado River Indian reservations.

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APPENDIX

APPENDIX

Relevant Sections of the
Indian Claims Commission Act
60 Stat. 1049 (1946), codified at
25 U.S.C. §§70 *et seq.* (1976)

REPRESENTATION BY ATTORNEY

Sec. 15 . . . The Attorney General or his assistants shall represent the United States in all claims presented to the Commission, and shall have authority, with the approval of the Commission, to compromise any claim presented to the Commission. Any such compromise shall be submitted by the Commission to the Congress as a part of its report as provided in section 21 hereof in the same manner as final determinations of the Commission, and shall be subject to the provisions of section 22 hereof.

FINAL DETERMINATION

Sec. 19. The final determination of the Commission shall be in writing, shall be filed with its clerk, and shall include (1) its findings of the facts upon which its conclusions are based; (2) a statement (a) whether there are any just grounds for relief of the claimant and, if so, the amount thereof; (b) whether there are any allowable offsets, counterclaims, or other deductions, and, if so, the amount thereof; and (3) a statement of its reasons for its findings and conclusions.

REVIEW BY COURT OF CLAIMS

Sec. 20. (a) In considering any claim the Commission at any time may certify to the Court of Claims any definite and distinct questions of law concerning which instructions are

desired for the proper disposition of the claim; and thereupon the Court of Claims may give appropriate instructions on the questions certified and transmit the same to the Commission for its guidance in the further consideration of the claim.

(b) When the final determination of the Commission has been filed with the clerk of said Commission the clerk shall give notice of the filing of such determination to the parties to the proceeding in manner and form as directed by the Commission. At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting "fair and honorable dealings", where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. The Court shall promulgate such rules of practice as it may find necessary to carry out the foregoing provisions of this section.

(c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed

by section 3 of the Act of February 13, 1925 (43 Stat. 939; 28 U.S.C., sec. 288), as amended.

REPORT OF COMMISSION TO CONGRESS

Sec. 21. In each claim, after the proceedings have been finally concluded, the Commission shall promptly submit its report to Congress.

The report to Congress shall contain (1) the final determination of the Commission; (2) a transcript of the proceedings or judgment upon review, if any, with the instructions of the Court of Claims; and (3) a statement of how each Commissioner voted upon the final determination of the claim.

EFFECT OF FINAL DETERMINATION OF COMMISSION

Sec. 22. (a) When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is hereby authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.

The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

(b) A final determination against a claimant made and reported in accordance with this Act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.